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July 9, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: April 16, 2004
Case No.: TIA-0084

XXXXXXXXXX (the Applicant) filed an appeal concerning an application to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late husband (the Worker). The Worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant appealed to the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted and the application remanded to OWA.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE. 1/

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under

1/ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov/esa.

the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

B. Procedural Background

The Worker was employed at DOE's Oak Ridge site. The Worker was born in 1920, and he worked at the site for 13 years, from 1972 until he retired in 1985. Record at 16, 21. In 2002, the Worker died, at the age of 82. *Id.* at 21. The death certificate cited cardio-respiratory arrest as the immediate cause of death, and respiratory insufficiency, bilateral pneumonia, and dementia as other conditions. *Id.*

The application sought physician panel review of the following illnesses: silicosis, asbestosis, and emphysema. Record at 2. The application stated that the Worker oiled machines and kept them clean and worked with concrete. The application attributed the Worker's illnesses to exposure to hazardous substances and cement.

The record indicates that the Applicant provided documentation of a diagnosis of silicosis to the OWA during the case development process. Record at 27 (Case History, 03/04/04 entry). The documentation apparently did not make its way into the record, and the record did not contain any other diagnosis of silicosis.

The Physician Panel rendered negative determinations on the three claimed illnesses. The Panel found no evidence that the Worker had

2/ See www.eh.doe.gov/advocacy.

the illnesses. The OWA accepted the Physician Panel's determinations, and the Applicant filed the instant appeal.

In her appeal, the Applicant challenges the Panel's negative determination on silicosis. The Applicant maintains that the Worker was diagnosed with silicosis, and she supplies a copy of a hospital report that includes the following statement: "The silicosis is obvious on his chest x-ray but has evidently caused no problem." Physician Report on 01/11/02 Hospital Admission at 1.

II. Analysis

The Physician Panel Rule provides for OWA submission to the panel of records gathered during the case development process. 10 C.F.R. §§ 852.4 to 852.6. In this case, the record indicates that the applicant provided documentation of a diagnosis that did not make its way into the record. Accordingly, the application should be remanded to OWA for further processing. We will forward a copy of the documentation to OWA so that the application, supplemented with this material, may receive further panel review.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0084 be, and hereby is, granted as set forth in Paragraph 2 below.
- (2) The Application that is the subject of this Appeal is remanded to the Office of Worker Advocacy for further processing consistent with this Decision.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 9, 2004